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Due Process

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SUPREME COURT, APPELLATE DIVISION
THIRD DEPARTMENT

People v. Couser[1]
(decided July 9, 1999)

Defendant John Couser was charged with felony murder in the first degree under Penal Law § 125.27(1)(a)(vii)[2] after ordering the execution of a witness scheduled to testify against him.[3] In a pre-trial motion, the defendant moved to dismiss the second count of an eighteen count indictment on the ground that the statutory limitation on accomplice liability, namely that the defendant "commanded" another to cause the death of the victim, is unconstitutionally vague under the due process clause of the Fourteenth Amendment to the United States Constitution[4] or Article I, Section 6[5] of the Constitution of the State of New York.[6] The Appellate Division, Fourth Department, reversed the decision of the Onondaga County Court, which had granted the dismissal,[7] and held that in a noncapital murder case, due process merely requires that the clause be sufficiently definite to serve as the statutory definition of a crime.[8] In dismissing any legislative ambiguity, the Court stressed that "[i]f the actions of the defendant [ ] are plainly within the ambit of the statute, the court will not

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[1] People v. Couser, 258 A.D.2d 74, 695 N.Y.S.2d 781 (4th Dep't, 1999).

[2] N.Y. Penal Law § 125.27(1)(a)(vii) (McKinney 1998). Clause (vii) provides in pertinent part: "the defendant's criminal liability under this subparagraph is based upon the defendant having commanded another person to cause the death of the victim or intended victim pursuant to section 20.00. Id.

[3] Couser, 258 A.D.2d at 75, 695 N.Y.S.2d at 783 (4th Dep't, 1999).

[4] U.S. Const. amend. XIV. The Fourteenth Amendment provides in pertinent part: "No State shall deprive any person of life, liberty, or property, without the due process of law." Id.

[5] N.Y. Const. art. I, § 6. This section provides in pertinent part: "No person shall be deprived of life, liberty or property without due process of law." Id.

[6] Couser, 258 A.D.2d at 76, 695 N.Y.S.2d at 783.

[7] People v. Couser, 176 Misc. 2d 101, 674 N.Y.S.2d 887 (Onondaga County Ct. 1998).

[8] Couser, 258 A.D.2d at 76, 695 N.Y.S.2d at 785. "The issue, however, is not whether that clause is sufficiently definite to serve as an aggravating factor establishing eligibility for the death penalty. The issue is whether that clause is sufficiently definite to serve as the statutory definition of a crime." Id.

strain to imagine marginal situations in which the application of the statute is not so clear."[9]

The charges arose out of the execution-style murder of Virginia Hackett and the non-fatal shooting of children John Paul Jones and Eugene Jones.[10] Gang member John Stanback allegedly was summoned to the Rochester jail where gang leader, defendant Couser, was incarcerated on robbery and attempted murder charges. Defendant Couser allegedly directed Stanback to murder James Hackett and supplied information necessary to carry out the task.[11] The intended victim reportedly was targeted because he was scheduled to testify that defendant Couser had attempted to kill him on a prior occasion.[12] On February 23, 1997, Stanback and other "hit squad" members went to James Hackett's Syracuse home intending to kill him. Finding only the elderly woman and the two young children, Stanback nevertheless shot each of them with a bullet to the head.[13]

In his pre-trial motion, the defendant argued that the "command" allegedly given to Stanback was limited to killing James Hackett and did not encompass the victims.[14] While not addressing itself directly to the merits of this argument, the trial court found that "neither the legislature nor the courts have given any guidance about what constitutes a 'command' under this statute."[15] The trial court declared that the indistinguishable boundaries on the culpability language of Penal Law § 20.00, specifically "solicits, requests, commands, importunes, or intentionally aids,"[16] do not give value to the limiting provision of § 125.27(1)(a)(vii),[17] and thus render the statute impermissibly vague.[18]

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[9] Id., quoting People v. Nelson, 69 N.Y.2d 302, 308.

[10] Couser, 176 Misc. 2d at 87, 674 N.Y.S.2d at 887.

[11] Id.

[12] Id.

[13] Couser, 258 A.D.2d at 76, 695 N.Y.S.2d at 783.

[14] Couser, 176 Misc. 2d at 87, 674 N.Y.S.2d at 888.

[15] Id. at 88, 674 N.Y.S.2d at 889.

[16] N.Y. Penal Law § 20.00 (McKinney 1998). Accessory liability under § 20.00 is criminal where one person, acting with the mental culpability required, either "solicits, requests, commands, importunes, or intentionally aids" another person to engage in offensive conduct. Id.

[17] N.Y. Penal Law § 125.27(1)(a)(vii) (McKinney 1998). Under § 125.27(1)(a)(vii), the class of death eligible defendants is limited to those

The Appellate Court began its analysis by pointing out that both the United States Supreme Court and Congress have made distinctions in accomplice liability between those who are unwilling parties to a felony murder and those who are "major participants."[19] In *Tison v. Arizona,*[20] the Supreme Court upheld the imposition of the death penalty where the defendant was not the principal shooter but was a major participant in the underlying felony.[21] Similarly, the restrictive language imposed by Congress in drafting 21 USC § 848(e)(1)(B)[22] indicated that the death penalty was to be reserved for those codefendants who acted as "boss accomplices" by ordering the execution of any Federal, State, or local law enforcement officer.[23] The recognition, therefore, of the codefendant as death eligible when distinguished by the degree of culpability, has found acceptance in both legal jurisprudence and legislative policy.

Here, the People argued, and the Court agreed, that the lower court erred[24] in applying an Eighth Amendment analysis to clause (vii) since the prosecutor in this case "allowed the statutory 120-day period to elapse without filing a notice of intent to seek the

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who have "commanded another person to cause the death of the victim or intended victim pursuant to section 20.00." Id.

[18] Couser, 176 Misc. 2d at 92, 674 N.Y.S.2d at 891.

[19] Couser, 258 A.D.2d at 77, 695 N.Y.S.2d at 784 (stating "[a] person who participates in a felony murder by commanding the death of the victim clearly qualifies as a major participant in that crime." Id.

[20] 481 U.S. 137 (1987).

[21] Couser, 258 A.D.2d at 77, 695 N.Y.S.2d at 784. "The Court stated that the death penalty is an appropriate penalty for someone who is a major participant in the underlying felony and who acts with reckless indifferenced to human life." Id. (citing Tison v. Arizona, 481 U.S. 137, 158 (1987).

[22] 21 U.S.C.A. § 848(e)(1)(B) provides in pertinent part:

[A]ny person, during the commission of, in furtherance of, or while attempting to avoid apprehension, prosecution or service of a prison sentence for, a felony . . . who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of any Federal, State, or local law enforcement officer . . . may be sentenced to death.

[23] Couser, 258 A.D.2d at 78, 695 N.Y.S.2d at 785. See Serr, "Of Crime and Punishment, Kingpins and Footsoldiers, Life and Death: The Drug War and the Federal Death Penalty Provision – Problems of Interpretation and Constitutionality," 25 Ariz. St. L.J. 895, 909 (1993).

[24] Couser, 258 A.D.2d at 78, 695 N.Y.S.2d at 785.

death penalty."[25] Thus, while § 125.27 may define eligibility for a death sentence, heightened scrutiny of the aggravating factors as required under *Holman v. Page*[26] is not applicable to this defendant. The vagueness argument, when correctly measured under a due process standard, necessarily fails because clause (vii) is sufficient as a statutory definition of a crime.[27]

Since the federal requirements of due process parallel those in Article I, Section 6 of the New York State Constitution, the Appellate Court limited its analysis to those requirements established by New York caselaw in *People v. Bright*[28]. In satisfying the first of the two-prong test for due process, the notice requirement, the Court found that "a person of ordinary intelligence" would be put on notice by § 125.27(1)(a)(vii) that "it is a crime of the highest magnitude to participate in a felony murder by commanding the death of the victim."[29]

The second due process requirement, that the statute be resistant to arbitrary or discriminatory enforcement, is deemed satisfied despite the defendant's argument that the term "command" is indistinguishable from the other § 20.00 terms of "solicit," "request," or "importune." Without a more objective standard, the defendant claims, jurors are left to indiscriminately apply their personal definition of the term to the defendant's acts.[30]

Rejecting the likelihood of any capricious interpretation, the Court found stability in the common sense meaning of the word "command" as defined by Webster's Dictionary:[31] "to direct

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[25] Couser, 258 A.D.2d at 76, 695 N.Y.S.2d at 783.

[26] 95 F.3d 481, 487 (7th Cir. 1996).

[27] Couser, 258 A.D.2d at 81, 695 N.Y.S.2d at 787.

[28] 71 N.Y.2d 376, 520 N.E.2d 1355, 526 N.Y.S.2d 66 (1988). In holding that Penal Law § 240.35(7) which forbids loitering, was unconstitutionally vague, the Court of Appeals stated that:

In a challenge to the constitutionality of a penal law on the grounds of vagueness, it is well settled that a two-pronged analysis is required. First, the statute must provide sufficient notice of what conduct is prohibited; second, the statute must not be written in such a manner as to permit or encourage arbitrary and discriminatory enforcement.

Id.

[29] Couser, 258 A.D.2d at 81, N.Y.S.2d at 787.

[30] Id.

[31] Webster's Ninth New International Dictionary 264 (1983).

authoritatively," i.e., "to give an order or orders."[32] While the Court cautioned that "[t]he fact that there may be situations where the line between a command and, for example, a solicitation is blurred does not render the clause unconstitutionally vague,"[33] such was not the case here. The acts attributed to the defendant clearly comported with the definition provided. The prosecution successfully established proof that Stanback was summoned to the jail, that the defendant instructed Stanback to "take care" of Hackett's family, and that Stanback thereafter informed others of his plans and motives. "That evidence, if believed, establishes that defendant did not merely request, solicit, or importune someone to kill the complainant but acted as a boss-accomplice to order a member of his gang to commit the crime."[34]

Further support for reversing the trial court's decision was found in the judicial obligation to accord any statute a strong presumption of constitutionality.[35] "All statutes, even statutes establishing crimes punishable by death," the Court informed, "are presumed to be constitutional."[36] In *People v. Cruz*,[37] the Court of Appeals expanded upon this obligation by directing that the plain meaning of a statute be typically embraced,[38] particularly when the legislature has offered no indication that an alternative meaning was intended.[39]

The strong language of the Court's opinion suggests that the proper procedural approach, when interpreting a statute in a noncapital case, is to begin with a presumption of constitutionality and then charge each relative term with its commonly understood meaning.[40] Straining for a different interpretation absent the necessity of a heightened scrutiny analysis would be construed as overreaching on the part of the judiciary.

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[32] Couser at 81, 695 N.Y.S.2d at 787.
[33] Id.
[34] Id.
[35] Couser at 81, 695 N.Y.S.2d at 786.
[36] Id.
[37] 48 N.Y.2d 419, 423 N.Y.S.2d 625, 399 N.E.2d 513 (1979).
[38] Id. at 428, 423 N.Y.S.2d at 629, 399 N.E.2d at 517.
[39] Couser, 258 A.D.2d at 80, 695 N.Y.S.2d at 786 (citing People v. Cruz, 48 N.Y.2d 419, 428, 423 N.Y.S.2d 625, 399 N.E.2d 513 (1979)).
[40] Couser, 258 A.D.2d at 80, 695 N.Y.S.2d at 786.

Ironically, the Fourth Department rejected the lower court's decision yet removed the statute from a capital punishment analysis by borrowing from the "individualized sentencing" principles referenced by the lower court[41] in *Gregg v. Georgia.*[42] While § 125.27(1)(a) offers a list of aggravating circumstances warranting the death penalty (thus potentially subjecting the statute to heightened scrutiny under the Eighth Amendment), the specific character of the case (the fact that the prosecution did not seek the death penalty, only the alternative sentence of life in prison) reduced the analysis to one of due process. Guided by the test laid out in *People v. Bright,*[43] the plain meaning of the word "command" when measured against this particular defendant's conduct, supported a finding that the statute was not subject to arbitrary interpretation but rather was constitutionally valid under Article I, Section 6 of the New York Constitution or the Fourteenth Amendment of the United States Constitution.

In conclusion, under the United States and New York State constitutional due process requirements of notice and resistance to arbitrary enforcement, the limitation on accomplice liability as set forth in clause (vii) of New York Penal Law § 125.27(1)(a) is not

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[41] Couser, 176 Misc. 2d at 91, 674 N.Y.S.2d at 891.

[42] 428 U.S. 153, 198 (1976) (upholding Georgia's sentencing procedures which require as a prerequisite to the imposition of the death penalty, specific jury findings as to the circumstances of the crime or the character of the defendant).

[43] 71 N.Y.2d 376, 382, 526 N.Y.S.2d 66, 70, 520 N.E.2d 1355, 1358 (1988).

vague or indefinite when applied as a statutory definition of a crime in a noncapital murder case.

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